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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1181

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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As initially stated in the Circuit Court opinion herein, Smith v. Royal Insurance Co., Ltd. (No. 9202), 111 Fed. (2d) 667 *at* 668—"The suit is on a valued policy of fire insurance upon a leasehold interest of appellant in property located in Belvedere, California."

Any implication that the cause of action was ever changed by any amended pleading is untrue and misleading. That proposition was set at rest by the Cir-

cuit Court on the second appeal (No. 8474), 93 Fed. (2d) 143 *at* 146:

> "However, appellant has but one cause of action. He is suing on one policy of insurance, not on several policies, and he is not asking for reformation."

The facts on the case in chief are substantially and fully stated in the third Circuit Court opinion, 111 Fed. (2d) 667 *at* 668, et seq. The terms of the policy are *there* set forth *in haec verba* and the applicable facts detailed—after which the Court concludes, page 670:

> "During the whole period of nearly half a century, appellant and his predecessors in interest had exclusive possession of the tract against all the world, including the owner. Their possession was lawful and their exclusive occupancy was accompanied by the regular payment of rent. The question here concerns the nature of their tenure—*whether it was a leasehold interest or a mere license.*"[1]

There were four trials of this cause in the District Court to which the cause was moved after having been filed in the Superior Court of the State of California on December 8, 1932. Each trial resulted in an appeal to the Circuit Court of Appeals for the Ninth Circuit: and each of the resulting judgments was reversed by the Circuit Court.

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[1]The question put in italics (supplied throughout) was and remained the sole issue of law and fact upon the first, second and third trial. Upon those trials, the affirmative defenses were not involved.

STATEMENT OF THE CASE.

The first appeal.

The first trial resulted in a judgment in favor of this respondent. (5 Fed. Supp. 435.) Your petitioner, the insurance company, which designation will hereafter be employed in the interest of clarity, appealed. That appeal resulted in a reversal, the Circuit Court holding, 77 Fed. (2d) 157, that the demurrer to the complaint should have been sustained because the pleading did not state a cause of action, in that no insurable interest was in fact alleged thereby. The insurance company had assigned as errors—*first,* the overruling of its demurrer, and second, the failure to allege and prove an insurable interest. That opinion concludes:

> "* * * The *complaint,* owing to its adherence to the proposition that the deed above mentioned is in and of itself sufficient to show an interest of plaintiff in the land, will not support a judgment, although its terms might, upon trial, be some evidence of the intention of the Belvedere Land Company.
>
> However, since the insurance company has not had an opportunity to meet and defend against any other theory of liability, the cause must be sent back for retrial. The demurrer to the complaint should have been sustained with leave to the plaintiff to amend, if so advised."

The second appeal.

Your respondent, accordingly, amended his complaint setting forth, because of the obscurely stated and incomprehensible law of the case, all of the known

facts and circumstances surrounding this ancient tenure.[2] The District Court sustained a demurrer thereto without leave to amend upon the theory that the law of the first appeal was fatal to the complaint as amended.

From the judgment entered thereon, your respondent appealed. The Circuit Court reversed the judgment, 93 Fed. (2d) 143 *at* 146, with the statement:

> "The judgment is reversed, with directions to overrule the demurrer and permit the appellee (the insurance company) to answer."

The third appeal.

Thereafter, the insurance company filed its answer to the amended complaint and a trial thereof to the same District Court resulted in a judgment for the insurance company—from which your respondent again appealed. Upon that appeal, the insurance company urged that there was a failure to prove the existence of an insurable interest and that *in any event* there was a failure to prove the insurable interest described in the policy.

The Circuit Court (No. 9202) (111 Fed. (2d) 667) determined, (a) that your respondent's interest in the land was not a mere license but a leasehold in-

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[2] *Smith v. Royal Insurance Co.*, 93 Fed. (2d) 143 at 145 (second appeal), states: "The third amended complaint contains numerous unnecessary averments and much evidentiary matter, and is not to be commended as a model pleading. But the essential facts pleaded are clear enough and we find no substantial uncertainty in them. The difficulty lies in the attempt to define appellant's interest. The uncertainty is one of law rather than of fact, and in the resolution of the problem we have had no help from counsel for appellee. * * *"

terest "terminable on the happening of the contingency insured against, and the contingency occurred"; (b) that "to bring himself within the provisions of the policy, appellant need establish no more than an insurable interest in the nature of a leasehold. This he did." and (c) that the first opinion—i.e., 77 Fed. (2d) 157—"as not accurately reflecting the applicable law, the court's intimation there concerning the necessity of appellant's (your respondent) proving an express lease" be and was disapproved. (111 Fed. (2d) *at* p. 670.[3]

The third C. C. opinion, taking cognizance of the fact that the insurance company had always theretofore answered setting up the affirmative defenses of fraud and mistake but that it *had withdrawn its affirmative defenses at all previous trials,*[4] concluded as follows:

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[3]Upon the third appeal and trial, apparently reconciling itself to the possible existence of an insurable interest in plaintiff, the insurance company sought to secure a policy interpretation to the effect that the policy required proof of a lease terminable *in no event* until the destruction of the buildings by fire or otherwise.

Then, on that interpretation, it argued a failure on the part of the plaintiff to prove such tenure—this in the absence of any reformation.

As to the necessity of pleading or proving a tenure terminable only upon the destruction of the building, the Circuit Court said, 111 Fed. (2d) *at* p. 671: "The insurance contract does not so provide; and such is not the law of the case."

[4]It is to be noted here that at the first and third trials, which were upon the facts and the law—the second trial being only upon the issue raised by demurrer—the insurance company pleaded certain affirmative defenses—i.e., mistake and misrepresentation or fraud. But at those trials, the insurance company had withdrawn its affirmative defenses and hence they were only placed in issue upon the fourth trial. (R. 58 et seq.)

> "Appellant (your respondent) may amend his complaint in conformity with his proof, and appellee (your petitioner) may amend its answer if it so desires. On another trial, appellee will have the opportunity of proving such affirmative defenses *as may be available to it.* Reversed." (111 Fed. (2d) 667 *at* 671.)

The fourth and last appeal.

Accordingly, your respondent amended his complaint alieging that he was possessed of the insurable interest described in the policy. (R. 1 et seq.) The insurance company answered and, *inter alia* again set up its affirmative defenses. (R. 16 et seq.)

The cause went into its last trial on the following two affirmative defenses: (1) That the policy was written upon the innocent misrepresentation by the insured that his tenure "ran to and until the destruction of the buildings" (R. 59), and (2) that the policy was written under the mutually mistaken belief that the tenure was for a term "running to and not expiring until the destruction of the building by fire or other casualty". (R. 62.)

The same trial Court (R. 31 et seq.) found for the insurance company, upon both the mistake and the "innocent fraud". From the judgment entered thereon, your respondent appealed (No. 9850), and upon that appeal your respondent urged: (1) that *no evidence* was adduced or attempted showing or tending to show that the mistaken belief or representation *was in fact false;* (2) that moreover, the alleged representation was, as a matter of law, merely

a statement of one's own judgment or belief (Cal. Ins. Code, §§339, 337, 354); (3) that it was not material nor was there evidence that it in fact induced the contract.[5]

The Circuit Court (No. 9850), 125 Fed. (2d) 222, rendered the opinion which is attacked herein—remanding "with directions to enter judgment for appellant". The holding was that for the reasons urged by your respondent the findings of the trial Court were "clearly erroneous".[6]

The insurance company now urges herein that the Circuit Court erred first in its construction of the insurance contract, and second in its construction of Rule 52 (a), F. R. C. P.

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[5]In this respect, counsel for the insurance company admitted or stipulated as follows (S. R. 101):

> "We also admit that prior to the issuance of said policy, *both plaintiff and defendant were in doubt* as to the proper designation of said interest; that it was the defendant *and not the plaintiff* who described the interest of the assured as set forth (in the policy) * * *."

This alone is sufficient to charge the representation as admittedly being one known to be a statement of belief or judgment or of one's "own judgment upon the matters in question".

[6]The Court pertinently observed—"Appellee has not sought or obtained reformation of the policy, and it strenuously denies that this is a case for reformation. It says the insurance contract, as drafted, 'is the exact contract that the parties intended to make' * * *."

This is pertinent because if the policy had been reformed to cover a tenure terminable only upon the destruction of the buildings by fire, the burden would have been upon the insured to prove such a tenure. But in the absence of reformation, *and in the face of its charge of fraud*, the burden was upon the insurance company to prove that this insured's tenure was in fact not one running for the life of the buildings.

POINTS AND AUTHORITIES.

I.

THE PETITION PRESENTS NO LEGAL BASIS FOR CERTIORARI UPON THE GROUND THAT THE CIRCUIT COURT MISINTERPRETED THE TERMS OF THE POLICY.

The terms employed by the policy—i.e., "lease" and "leasehold interest"—were construed by the Circuit Court upon the *third* appeal (No. 9202) (111 Fed. (2d) 667). The subsequent and *fourth* opinion, 125 Fed. (2d) 222, which is the subject of this proceeding, *involves no questions of construction.*

Patently the gravamen of petitioner's complaint in this respect is that the Circuit Court, *upon a prior hearing,* should have reformed or construed the policy as insuring a tenure terminable only upon the destruction of the building—and consequentially as placing the burden of proof of the existence of such a tenure upon the insured.

But by its prior opinion, 111 Fed. (2d) 667 *at* 671, the Circuit Court definitely set at rest any question upon that contention, concluding: "The insurance contract does not so provide; and such is not the law of the case."

At the last trial, which resulted in the *fourth* opinion (125 Fed. (2d) 222), now directly attacked by the present petition, the issues made were *solely upon the affirmative defenses* of the insurance company.

The company charged fraud, actual or constructive, not as a basis for reformation of the policy but in avoidance thereof—thereby assuming the burden

of proof upon the falsity of the alleged representation.[7]

As counsel admits in the opening page of his present petition, a petition for writ of certiorari in connection with the prior appeal, which alone involved the question of the interpretation or construction of the policy was made and denied by this Court. (October Term, 1940, No. 307.)

(1) Under these circumstances there is, therefore, grave doubt as to whether any question as to the construction of the policy arises *on this record*—if not, the point on construction may not here be made the basis of a writ. (*Tyrrell v. Dist. of Col.*, 243 U. S. 1, 61 L. Ed. 557; *Furness etc. Co. v. Wang-Tsze Ins. Assn.*, 242 U. S. 430, 61 L. Ed. 409.)

(2) The ground under discussion does not fall within the letter or spirit of subs. (a), (b) or (c) of Section 5 of Rule 38 of the Revised Rules of the Supreme Court. The issue revolves entirely upon well settled local or state laws, and the cause grows out of a California contract.[8]

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[7]Upon the issue of falsity, the insurance company adduced not one scintilla of evidence. It in fact made no attempt to introduce evidence of the falsity of the alleged misrepresentation or belief.

[8]Upon the question of construction of an insurance policy, the law in California is well settled. In *Fageol T. & C. Co. v. Pac. Indemnity Co.* (1941), 18 Cal. (2d) 731 *at* 747, 117 Pac. (2d) 661, it is stated:

> "But if there be any ambiguity in the Detroit policy, it must be resolved against the insurer. (32 C. J. 1152, sec. 265.) If to give the quoted clause the meaning contended for would release Detroit from liability, then it must be construed so as to permit recovery since it is 'susceptible of such construction'. Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail. (32 C. J. 1155, sec. 265; Hartford Steam Boiler etc. Co. v. Cochran Oil Mill etc. Co., 26 Ga. App. 288, 105 S. E. 856, 859.)"

Upon a question controlled by state or local law, even actual or probable conflict among the circuits is not of itself a reason for granting the writ. Nor should this Court be asked merely to review the evidence or inferences drawn from it in connection with the construction of the language of the policy. (*Rhulin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.)

(3) Moreover, the statement of the Circuit Court contained in its third opinion—"The definition of these terms (lease and leasehold interest) appears to embrace, in effect, any agreement whether express or implied which gives rise to the relationship of landlord and tenant"—not only finds abundant and authoritative support in the opinion itself but is, without question, the definition accepted in California and elsewhere. (15 *Cal. Jur.* 598; *Beckett v. City of Paris,* 14 Cal. (2d) 633 at 636, 96 Pac. (2d) 122; *Dean v. Brower,* 119 Cal. App. 412 *at* 415, 6 Pac. (2d) 580; *Stone v. L. A.,* 114 Cal. App. 192, 229 Pac. 838; *Shaw v. Caldwell,* 16 Cal. App. 1 *at* 7, 115 Pac. 941.)

Without analyzing at length the numerous definitions of "lease" and "leasehold" set out by petitioner in its brief (7-11), it may be observed in conclusion that a complete perusal of its references compels the conclusion that wherever the relation of landlord and tenant obtains a lease or leasehold interest exists—*and this irrespective of the length of the term.*

II.

THE PETITION PRESENTS NO LEGAL BASIS FOR CERTIORARI UPON THE GROUND THAT THE DISTRICT COURT FINDINGS WERE NOT "CLEARLY ERRONEOUS", OR THAT THE CIRCUIT COURT VIOLATED RULE 52(a) F. R. C. P.

The applicable portion of the rule referred to reads as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Upon the last trial (Fourth Appeal No. 9850), the insurance company urged two contradictory and incompatible affirmative defenses—(a) that plaintiff's broker falsely, but innocently, represented that the tenure ran for the life of the building; and (b) that the policy was written under the mutually mistaken belief that the tenure ran for the life of the building. (R. 59 et seq.)

The mutual mistake defense may be passed because

> "*Without reformation,* an insurer cannot, in an action at law, avail itself of the affirmative defense of mutual mistake in the execution of a contract." (8 Couch on Insurance 7018, §2168.)

Coming, then, to the fraud, actual or constructive, your respondent urged upon the last appeal, *inter alia,* a failure to prove falsity, materiality or reliance, etc. (R. 222.)

Upon the trial of the affirmative issues (C. C. No. 9850) the insurance company *introduced no exhibits* and called *but one* witness who had any knowledge

of the transaction, Mr. Evans, one of its officers. (R. 88-118.) This witness admittedly had neither knowledge of the falsity nor of the truth of the representation. He was not interrogated upon the issue of FALSITY.

Admittedly, then, the record on the last appeal (No. 9850) contains not one item of evidence showing or tending to show, or addressed to the proof of, the falsity of either the belief or of the representation.[9]

Upon that record, the finding of "falsity" is "clearly erroneous". The judging of the credibility of witnesses and the weighing of the conflicting evidence are matters entirely extraneous to that record.

The supplemental record (No. 9202—S. R. herein).

The second and last error urged by the petitioner is, therefore, necessarily untenable—unless the Supplemental Record contains substantial evidence which may *in law and fact* form the basis of the trial Court's "independent appraisal" in making its finding of *falsity*.

But the issue of "falsity" is foreign to the Supplemental Record. Neither the representation nor its falsity were in issue at this previous trial. (S. R. 338.)

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[9]Upon what, then, did the trial Court base the "clearly erroneous" finding of falsity? The Circuit Court (125 Fed. (2d) 222 at 224) has the answer:

> "It is to be gathered that the court regarded our decision on the *last appeal* as holding that a tenure of no higher dignity than one from month to month had been established. *The opinion cannot fairly be so construed.* The only question then before us was whether the evidence disclosed any insurable interest in the nature of a leasehold. *We were not called upon to decide, and did not decide, whether such estate as appellant had was terminable short of the destruction of his dwellings.* * * *" (Italics ours.)

Moreover, at that trial, the insurance company called *no* witnesses—adduced no testimony whatsoever. (S. R. VII-VIII.) So there, too, the determination of the credibility of witnesses or conflicting testimony is not involved.[10] Nor has counsel pointed to any conflict of testimony or to any testimony supporting the finding of *falsity*.

The insurance company's sole contribution to the Supplemental Record herein consisted of twenty-eight exhibits (S. R. II, III, IV, "A" to "BB")—all introduced upon the cross-examination of your respondent's witnesses. But not one of these twenty-eight exhibits, the construction of which is, of course, *purely a matter of law*, even bears upon the extent of the tenure or points the falsity of this (then not in issue) representation or belief. The plaintiff introduced thirty-two exhibits. Of the fifty exhibits, not one is inconsistent with the other, nor is any inconsistency pointed.

It will serve no useful purpose to analyze these various exhibits. Nor has petitioner particularly pointed to any thereof as carrying an inference of the falsity of *any* representation. Its counsel does make reference to three thereof—the Preusser letter, the assessment rolls and the Federal estate tax return

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[10]Nor did any of plaintiff's witnesses, of course, give testimony upon the falsity of the representation or from which that falsity could be inferred. Those of these witnesses who had any conviction on the subject, on the contrary, gave testimony which would point the truth of any such representation. (Benson, S. R. 107 et seq.; Estabrook, S. R. 165 et seq.; Hanley, 281 et seq.; Preusser, 149 et seq.; Smith, 202 et seq.)

(pp. 16-17 of petition)—as carrying the inference that no leasehold interest ever existed.[11]

Upon this Supplemental Record the trial Court found that your respondent had neither insurable interest nor any leasehold interest. (S. R. 92.) The Supplemental Record, being entirely free of conflict, it must be assumed that the Trial Court's finding was purely one of law. The inevitable conclusion is that Rule 52 is inapplicable.

The quarrel here is not so much as to the force or dignity of petitioner's authorities but as to their application. In the last analysis, counsel comes to bar admitting "the evidence is without material conflict" and "undisputed" and that no credibility of witnesses, *at least on the issue of falsity,* is involved and that the burden of proving the *falsity* is upon

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[11]The Preusser letter, written November 9, 1927, in an attempt to beat down the price on the property (S. R. 161) proves nothing of the sort claimed. She never owned the property. It is not only rank hearsay on the part of a stranger to the title as to something she could not in the nature of things have had knowledge, but she admitted that she never discussed it with Mr. Keil (S. R. 162), and herself denied the truth of the letter's contents. (S. R. 163.) This hearsay does not even approximate in evidentiary strength the Keil statement to Hanley that he had a tenure for the life of the structures. (S. R. 305 et seq.) Keil, the man who erected the building in 1884, is the person who, at the time of the trial, was incompetent to testify. It was stipulated that he would never again regain competency. (S. R. 337.)

As to the assessment rolls, which did show that the leasehold interest had never been assessed to the plaintiff or his predecessors in title, it must be observed that this *spells nothing as to the length of the tenure,* for by the California law referred to (California Political Code §3820) *any possessory right,* whether lease or license, is taxable.

Nor does the Federal estate tax return made by a trustee for the deceased owner, Mrs. Bland, throw any light upon the length of the tenure *but only upon its existence.*

him. He would then defend the finding of *falsity* as not being "clearly erroneous" upon the sole ground that the trial judge made it—and invoke Rule 52 as prohibiting an Appellate Court from determining whether there is any basis in law or fact for the finding. Carried to its logical conclusion, this would destroy the appellate function.

While it may be true that Rule 52 (a) has not "enlarged the discretion" of an Appellate Court "in passing upon the probative force of evidence", it cannot be said that the rule has shackled that discretion to the end that an Appellate Court may not read and construe exhibits and pass upon "undisputed evidence" or determine whether a litigant has successfully sustained the burden of proof.[12]

It is respectfully submitted that for the foregoing reasons the two errors urged herein are insufficient to warrant the issuance of the writ prayed.

Dated, San Francisco, California,
May 15, 1942.

A. B. BIANCHI,
JAMES M. HANLEY,
Attorneys for Respondent.

[12]The charge made against your respondent, call it by any name, is still fraud, actual or constructive, and the burden of its clear proof is, by every authority, upon the accuser.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of May, 1942.*

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Attorneys for Petitioner.